BRIEF FOR THE AMERICAN LEGION, AMICUS CURIAE

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In the

Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH,
Petitioner,

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN LEGION AMICUS CURIAE

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No. 150

In the

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October Term, 1954

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH,

Petitioner,

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN LEGION AMICUS CURIAE

PRELIMINARY STATEMENT

This Brief is filed by The American Legion, *amicus curiae,* pursuant to Rule 42(2), Revised Rules of the Supreme Court adopted April 12, 1954 and effective July 1, 1954.

The American Legion is composed of veterans of both World Wars and those who served during the Korean hostilities. It is a non-political civilian organization originally chartered by Act of Congress on September 10, 1919 (U. S. C. A. Title 36, Sec. 41-51, inclusive). It has fifty-eight (58) Departments, forty-nine (49) of which are located within the continental limits of the United States, which, in turn, are organized into Posts; at the present time there are 17,172 Posts with a total membership of 2,791,762.

Since the inception of the Legion, the first precept in the Preamble to its Constitution has been "to uphold and defend the Constitution of the United States of America." Furthermore, in 1942, Congress amended the Legion's Charter to include this purpose. (36 U. S. C. A. Sec. 43, 56 Stat. 1012) Consequently, the Legion has a deep interest in the protection of the constitutional rights of all veterans.

In this Brief the Legion will support the petitioner and will set forth the reasons why it believes the decision of the court below should be reversed.

The record in this case presents a number of questions which call for an interpretation of the validity and application of certain Articles of the Uniform Code of Military Justice which involve the constitutional rights of Robert W. Toth, who had received an honorable discharge from the United States Air Service, returning him to a civilian status, but who thereafter was charged with a serious offense under Article 3(a) of said Code.

No doubt the parties to this action, in their respective Briefs, have supplied or will supply the opinions below, the jurisdiction of the court, the questions presented, the statement of the case and its disposition, and we shall avoid repeating them herein. However, we will set forth the

constitutional provisions and statutes which we consider pertinent to the determination of this cause.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution are involved in this action:

> Article 1, Section 8. The Congress shall have power:
>
> Clause 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . .
>
> Clause 14. To make rules for the government and regulation of the land and naval forces.
>
> Amendment 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Statutes

Article 2, the Uniform Code of Military Justice, 64 Stat. 109, 50 U. S. C. A., 552 (See Appendix I).

Article 3(a), the Uniform Code of Military Justice, 64 Stat. 109, 50 U. S. C. A., Section 553(a) provides:

> Article 3(a): Subject to the provisions of Article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five

> years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

Article 7(b), the Uniform Code of Military Justice, 64 Stat. 111, 50 U. S. C. A., Section 561(b) provides:

> (b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

ARGUMENT

I

Article 2 of the Uniform Code of Military Justice enumerates, by class, those persons who are subject thereto. This section includes those persons belonging to a regular component of the Armed Forces while in that status. Article 3(a) of the Code recognizes that such persons were only subject to the Code while in that status, but attempts to make them amenable to trial as civilians, which makes it inoperative. Article 7(b) of the Code would also be inoperative for the same reason.

Robert W. Toth received an honorable discharge from the United States Air Force on December 8, 1952. (R. 1 & 2) Before his discharge he had served in Korea. Later, on April 8, 1953, court martial charges under oath were filed against him, under which he was accused of the murder in Korea of a Korean National and with conspiracy to commit murder against said Korean National. It was further charged that said alleged offenses were committed on or about September 27, 1952. (R. 15) On May 13, 1953, which was several months after his honorable discharge, he was arrested by the military forces and transported to Korea in connection with these charges. (R. 20)

Article 2, Uniform Code of Military Justice, 64 Stat. 109, 50 U. S. C. A. Sec. 552, specifically sets out the persons who are subject to the Code. Subsection 1 of this Article includes "all persons belonging to a regular component of the Armed Forces, including those awaiting discharge after expiration of the terms of enlistment."

We can only conclude from this language that members of the Armed Forces were only subject to the Code during

their respective periods of service. This is recognized by the language used in Article 3(a) of the Code, 64 Stat. 109, 50 U. S. C. A. Sec. 553(a), which attempts to make a person amenable to trial by court martial for an offense allegedly committed *"while in a status in which he was subject to this Chapter."* (Our emphasis)

The Chapter covering the Uniform Code of Military Justice not only provides procedure, but also lists the offenses, the commission of which may subject the offender to trial by court martial. Consequently, Article 2 of the Code, by enumerating the persons subject to the Chapter (Code) had reference to all of the provisions of the Chapter, including offenses and the trial thereof. After his discharge to civilian life, Toth was no longer "in a status in which he was subject to this Chapter." This being true, Article 3(a) would of necessity be inoperative, as it attempts to make a person amenable to trial by court martial after his status has changed from that of a member of the Armed Forces to that of a civilian, although under Article 2 he is not made subject to such trial as a civilian.

Article 7(b), authorizing apprehension, 64 Stat. 111, 50 U. S. C. A. Sec. 561(b) would also be inoperative in the instant case, as Toth was returned to the status of a civilian by his honorable discharge, and there is no attempt under any provision of the Code to return a civilian to the military service for apprehension and trial.

Inasmuch as the charges against Toth are criminal in nature and involve his life and liberty, the provisions of the Act applicable to such charges must be strictly construed.

Aside from the constitutional questions involved in this case, which will later be discussed, we submit that Article

3(a) can have no application to a civilian. Military jurisdiction in this case would be violative of the traditions of our government since its inception. In a concurring opinion in the case of *Duncan v. Kahanamoku*, 327 U. S. 304, 90 L. Ed. 688, 66 Sup. Ct. 606, it was stated:

> "Abhorrence of military rule is ingrained in our form of government. Those who founded this nation knew full well that the arbitrary power of conviction and punishment for pretended offenses is the hallmark of despotism. See The Federalist, No. 83. History had demonstrated that fact to them time and again. They shed their blood to win independence from a ruler who they alleged was attempting to render the 'military independent of and superior to the civil power' and who was 'depriving us of the benefits of trial by jury.' In the earliest state constitutions they inserted definite provisions placing the military under 'strict subordination' to the civil power at all times and in all cases. And in framing the Bill of Rights of the Federal Constitution they were careful to make sure that the power to punish would rest primarily with the civil authorities at all times. They believed that a trial by an established court, with an impartial jury, was the only certain way to protect an individual against oppression. The Bill of Rights translated that belief into reality by guaranteeing the observance of jury trials and other basic procedural rights foreign to military proceedings. This supremacy of the civil over the military is one of our great heritages. It has made possible the attainment of a high degree of liberty regulated by law rather than by caprice. Our duty is to give effect to that heritage at all times, that it may be handed down untarnished to future generations."

The Legion views with great concern the attempt of Congress under Article 3(a) to go beyond and disregard the finality of an honorable discharge for the purpose of

making a private citizen amenable to trial by court martial as a civilian. Since the adoption of the Uniform Code of Military Justice, approximately two million men have been inducted into the military service, many have been discharged honorably, and if the Universal Military Training and Service Act which was adopted June 19, 1951 (C. 144, Tit. 1, Sec. 1(a), 65 Stat. —, 50 Appendix U.S.C.A. Sec. 451 et seq.) continues in effect, many others will serve honorably and be separated honorably from such service.

If these men can be recalled for trial by Court Martial by the military under an Act of Congress, after return to civilian life, then an honorable discharge is of little value, and the Bill of Rights has become ineffective for the protection of human rights.

II

Congress acted without Constitutional authority in adopting Article 3(a). Consequently, the United States Air Force has no jurisdiction over the accused.

The fundamental question involved in this case is whether the United States Air Force has jurisdiction over Toth under Article 3(a). This requires an inquiry into the constitutional authority of Congress to adopt this Article.

Congress has the power under Article 1, Section 8, Clause 12, of the Constitution, "to raise and support armies". This could not possibly be applicable to the instant case, as Article 3(a) makes no provision for the return of the accused to the military service, even for the purpose of the trial. Under the provisions of the article, the accused could only be tried as a civilian. Consequently, the Congressional authority to raise armies is not involved. Nor is the Congressional authority to govern and regulate the land forces (Article 1, Section 8, Clause 14) a factor, as the accused has

been discharged from his military service and has returned to civilian life. We find no provision in the Code for the recall of any person who might be subject to Article 3(a). Flannery v. Commanding General, Second Service Command, et al. (1946), 69 Fed. Supp. 661.

It has been insisted by counsel for the respondent that the portion of the Fifth Amendment "except in cases arising in the land or naval forces" affords constitutional authority for the adoption by Congress of Article 3(a) of the Code. This contention is predicated on the case of In Re: Bogart, 3 Fed Cases, 796 (1873), which was followed without consideration in Ex Parte Joly, D. C., 290 Fed. 858 (D.C.S.D. N.Y. 1922) and Terry v. U. S., 2 Fed. Supp. 962 (D.C.W.D. Wash. 1933).

The Bogart case construed the word "cases" as used in the Fifth Amendment, as being synonymous with "events". This theory was adopted by the Circuit Court of Appeals in the instant case. In the Bogart case the court adopted the dictionary definition. We submit that the word "cases", as used in this Amendment, should be construed as synonymous with "prosecutions" and not "events", as it certainly refers to disciplinary proceedings which arise in the land and naval forces.

Chief Justice Marshall, in Marbury v. Madison, 1 Cranch 137, defined a case as a suit instituted pursuant to the regular course of judicial procedure. In the later case of Osborne et al. v. The Bank of the United States, 9 Wheat. 738 (page 819), in declaring the judicial power of the United States under the first Section, Third Article of the Constitution, he again construed the word "cases" as follows:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any

> question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States."

In the following cases, a similar construction was given this word:

> **U. S. v. Rosenthal, 121 Fed. 862, 866 (C.C.S.D. N.Y. 1903);**
> **U. S. ex rel. Flannery v. Commanding General, supra;**
> **In Re Pacific Railway Commission, C.C.Cal., 32 F. 241, 255;**
> Cooke v. State of Ind., 7 Blackf. 165;
> Calderwood v. Peyser, 42 Cal. 110, 115;
> Comstock Mill v. Allen, 21 Nev. 325, 31 Pacific 434.

In his Treatise on Military Law and Precedents, Gov't Printing Office (2d Ed. 1920) at pages 106, 107, Col. William Winthrop, a recognized authority on military law, expressed grave doubt as to the constitutionality of legislation which authorized court martial jurisdiction over civilians.

At the Congressional Committee Hearings prior to the passage of the Code, doubt was also expressed by various witnesses relative to the constitutionality of Article 3(a).

The then Judge Advocate General of the Army, in speaking with reference to Article 3(a), stated:

> "I believe this is unnecessary, and the inevitable result will be public revulsion against its exercise." (Sen. Rep. No. 486, page 256, 81st Cong., 1st Sess. (1949)).

Mr. Felix Larkin, Assistant General Counsel of the Office of the Secretary of Defense, who was Executive Secretary of the Committee on the Uniform Code of Military Justice, also stated his views on Article 3(a) as follows:

> "There is one concern that I would have * * * and I do not know the answer, frankly * * * which has to do with the third type if you will, and that is the person who serves, is discharged and who neither joins the reserves or does not re-enlist and becomes for all purposes a civilian.
>
> "The question I have in connection with it—actually I think if it were possible you ought to be consistent across the boards in those types of cases—is the constitutionality of attempting to retain a continuing jurisdiction over that person since now he clearly is not in the land or naval forces, even though while he was in them he did commit an offense which would have made him subject to its jurisdiction if tried at that time. * * * I think there is a difficult legal problem in that one type at least." (H. R. Rep. No. 491, page 883)

Article 3(a) of the Uniform Code, by its own terms, is an attempt to extend jurisdiction to the military forces over a civilian whose military status has terminated, as it only applies in such instances. In the case of Mosher v. Hunter (1944), 143 Fed. Rep. 2d 745 the court held that court martial jurisdiction cannot be exercised after discharge in connection with an alleged offense committed against military law unless it has attached before separation from such service.

In Ex Parte Richard Quirin (1942), 317 U. S. 1, at page 41, this Court stated:

> "We may assume, without deciding, that a trial prosecuted before a military commission created by military

> authority is not one 'arising in the land * * * forces,' *when the accused is not a member of or associated with those forces.*" (Italics supplied)

and again at page 43 the Court said:

> "The exception from the Amendments of 'cases arising in the land or naval forces' was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. *Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces* for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts." (Italics supplied)

The court below, in construing the word "cases" as used in the Fifth Amendment, violated one of the fundamental canons for the construction of constitutional provisions to the effect: "that the provisions for the protection of life, liberty and property are to be largely and liberally construed in favor of the citizen". (11 Amer. Juris. 670, Sec. 59 Ex Parte In the Matter of Edward Lange, Petitioner, 18 Wall. 163, Ex Rel. Flannery v. Commanding General, supra.)

III

Executive Order 10247, suspending the limitations prescribed by the Table of Maximum Punishments, U. S. Manual for Court Martial, destroyed the due process guaranty under the Fifth Amendment.

Article 3(a) of the Uniform Code was intended to cover those major crimes punishable by confinement of five years or more, but in reality, petty offenses are now included. The Table of Maximum Punishments, as set out at page 19 of the Manual for Court Martial, U. S. 1951, determines

the punishment for each offense under the Code. This Table is automatically suspended as to certain offenses in time of war. (P. 217, Par. 127c, Manual for Court Martial, supra.) The President of the United States, under date of May 29, 1951, by Executive Order 10247 (See Appendix II), suspended the Table of Maximum Punishments in the Far East Command with reference to punishments for violations of Articles 82, 85, 86(3), 87, 90, 91(1) and (2), 113 and 115 of the Uniform Code of Military Justice. By this action, minor offenses such as a one-day absence without leave (Article 86(3) of the Code), for which the usual punishment under the Table of Maximum Punishments was three days at hard labor, is now "punishable" by confinement of five years or more, and honorably discharged offenders would be subject to the provisions of Article 3(a) of the Code. A violation of Article 87 of the Code (Missing Movement) which carried a relatively light punishment under the Table, is now "punishable" by confinement of five years or more, under Article 3(a) of the Code.

To make such offenses punishable under Article 3(a), changes the original purpose of Congress, and by the inclusion of relatively minor offenses, 3(a), is so lacking in due process as to constitute deprivation of constitutional guaranties under the Fifth Amendment. The questions which are presented in this case are of grave concern to all veterans who were inducted and discharged after the adoption of the Uniform Military Code, as the issue involved is the superiority of the civil power over the military power.

CONCLUSION

For the reasons herein stated, we submit that the decision of the court below should be reversed and that the

petitioner should be granted such other and further relief to which he may be entitled.

Respectfully submitted,

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APPENDIX I

ARTICLE 2. UNIFORM CODE OF MILITARY JUSTICE

(65 STAT. 109, 50 U. S. C. A. SEC. 552)

The following persons are subject to this chapter:

(1) All persons belonging to a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; all volunteers from the time of their muster or acceptance into the armed forces of the United States; all inductees from the time of their actual induction into the armed forces of the United States, and all other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates they are required by the terms of the call or order to obey the same;

(2) Cadets, aviation cadets, and midshipmen;

(3) Reserve personnel while they are on inactive duty training authorized by written orders which are voluntarily accepted by them, which orders specify that they are subject to this code;

(4) Retired personnel of a regular component of the armed forces who are entitled to receive pay;

(5) Retired personnel of a reserve component who are receiving hospitalization from an armed force;

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve;

(7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;

(8) Personnel of the Coast and Geodetic Survey, Public Health Service, and other organizations, when assigned to and serving with the armed forces of the United States;

(9) Prisoners of war in custody of the armed forces;

(10) In time of war, all persons serving with or accompanying an armed force in the field;

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;

(12) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and without the following Territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

APPENDIX II

EXECUTIVE ORDER 10247 (3 CFR—1951 SUPPLEMENT)

Suspending the limitations upon punishments for violations of Articles 82, 85, 86 (3), 87, 90, 91 (1) and (2), 113 and 115, of the Uniform Code of Military Justice.

By virtue of the authority vested in me by Article 56 of the Uniform Code of Military Justice (established by the Act of May 5th, 1950, 65 Stat. 107) and as President of the United States, I hereby suspend, until further order, as to offenses committed on and after May 31st, 1951, by persons under the command of, or within any area controlled by the Commander in Chief, Far East, or any of his successors in Command, the limitations prescribed by the Table of Maximum Punishments, Par. 127c of the Manual for Courts Martial, United States, 1951 (prescribed by Executive Order No. 10214 of February 8th, 1951), upon punishments for violations of Acts 82, 85, 86 (3), 87, 90, 91 (1) and (2), 113 and 115 of the Uniform Code of Military Justice.

HARRY S. TRUMAN

THE WHITE HOUSE
MAY 29th, 1951